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May 10, 2006

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: January 25, 2006

Case Number: TSO-0342

This Decision concerns the eligibility of XXXXXXXXXXXX (the Individual") for continued access authorization. This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, access authorization should be granted to the Individual. For the reasons detailed below, it is my decision that access authorization should not be granted at this time.

I. APPLICABLE REGULATIONS

The regulations governing an individual's eligibility for access authorization (also "security clearance") are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." An individual is eligible for access authorization if such authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). "Any doubt as to an individual's access authorization eligibility shall be resolved in favor of the national security." *Id. See generally Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988) (the "clearly consistent with the interests of national security" test indicates that "security-clearance determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990) (strong presumption against the issuance of a security clearance).

If a question concerning an individual's eligibility for a clearance cannot be resolved, the matter is referred to administrative review. 10 C.F.R. § 710.9. The individual has the option of obtaining a decision by the manager at the site based on the existing information or appearing before a hearing officer. *Id.* § 710.21(b)(3). The burden is on the individual to present testimony or evidence to demonstrate that he is eligible for access authorization, i.e., that access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." *Id.* § 710.27(a).

II. BACKGROUND

The Individual is employed at a DOE facility in a position that requires him to hold an access authorization (security clearance). Application was made by his employer for a

security clearance but, by letter dated August 9, 2005 (the Notification Letter). DOE notified the Individual that it possessed derogatory information that created a substantial doubt as to the Individual's eligibility for a clearance under 10 C.F.R. § 710.8, paragraphs (h)¹ and (j)². Attachment, *Notification Letter*. The letter advised the Individual of his right to request a hearing in the matter which he did. The DOE forwarded the request for a hearing to the Office of Hearings and Appeals (OHA) and I was appointed to serve as Hearing Officer.

According to the Notification Letter, DOE possesses information which indicates the Individual is or has been:

. . . a user of alcohol habitually to excess, or has been diagnosed by a psychiatrist as alcohol dependent or as suffering from alcohol abuse. His alcoholism is an illness or mental condition which in the opinion of a psychiatrist, causes or may cause, a significant defect in the judgment or reliability of [the Individual]. This behavior is subject to the provisions of Title 10, Code of Federal Regulations (10 CFR), Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material," Section 710.8, paragraphs (h) and (j).

Notification Letter attachment at 1.

The Notification Letter also states that the Individual:

Has engaged in unusual conduct or is subject to circumstances which tend to show that he is not honest, reliable, or trustworthy; or which furnishes reason to believe that he may be subject to pressure, coercion, exploitation or duress which may cause him to act contrary to the best interests of the national security this behavior is subject to the provisions of 10 CFR 710.8(l) (Criterion L)³.

As support, the Notification Letter enumerates documented alcohol difficulties and related matters from 1992 to the present time, including:

- Psychiatric and personnel interviews other than those for this proceeding.
- Suspension from duty due to alcohol abuse and related chronically elevated liver enzymes.
- Pledges to refrain from drinking alcohol.

¹ (h) An illness or mental condition of a nature which, in the opinion of a psychiatrist or licensed clinical psychologist, causes or may cause, a significant defect in judgment or reliability.

² (j) Been, or is, a user of alcohol habitually to excess, or has been diagnosed by a psychiatrist or a licensed clinical psychologist as alcohol dependent or as suffering from alcohol abuse.

³ (l) Engaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security. Such conduct or circumstances include, but are not limited to, criminal behavior, a pattern of financial irresponsibility, conflicting allegiances, or violation of any commitment or promise upon which DOE previously relied to favorably resolve an issue of access authorization eligibility.

- Claims that he was no longer drinking alcohol, later shown to be untrue.
- Unsuccessful requests and recommendations of relatives, a personal physician and professional counselor to stop drinking.
- The Individual's acknowledgment that alcohol is a problem for him.
- A previous suspension of his access authorization based upon alcohol-related concerns.
- Incidents of driving while intoxicated.
- A 1998 hearing before the Office of Hearings and Appeals which was terminated prior to a decision when the Individual tested positive for alcohol at work and resigned in lieu of termination.

Notification Letter attachment, at 1-3.

In the request for a hearing, the individual does not challenge any part of the Notification Letter.

The record in the proceeding includes two reports by a DOE-sponsored psychiatrist concerning the Individual, his alcohol consumption, and DOE's security concerns. The first report, dated July 31, 1997, arose after a routine physical check by the employer revealed "high liver enzymes." *July 31, 1997 Psychiatrist's Report(the 1997 Report) at 8.* The Individual had gotten two DWI's since 1993 – one involving a near-fatal accident and the second a brief incarceration. *1997 Report at 7.* The 1997 interview with the Individual was directed towards answering four questions posed by DOE:

1. Is the subject a user of alcohol habitually to excess or is he alcohol dependent or suffering from alcohol abuse?
2. If so, is there adequate evidence of rehabilitation and reformation?
3. If not rehabilitated, what length of time and type of treatment would be necessary for adequate evidence of rehabilitation and reformation?
4. Does the subject have an illness or mental condition which causes, or may cause, a significant defect in judgment or reliability?

At the time of the interview, the Individual said that he had not had a drink of alcohol for two months. *1997 Report at 23.* He also said that he was meeting with a counselor at his place of employment as well as having attended some outpatient treatment and AA meetings in connection with the DWI's in the early 1990s. The elevated liver enzymes persisted at the time of the 1997 interview.

In response to the first three questions posed by DOE, the psychiatrist answered as follows:

- Based on information documented in the body of this report, the (Individual) met the *DSM-IV*⁴ criteria for Substance Abuse, Alcohol, in 1993 and in 1996. Since 1997, he now meets the *DSM-IV* criteria for Substance Dependence, Alcohol. Based on his history, as well as the serial [medical] laboratory findings since 1993, there is evidence that he is drinking habitually to excess. . . . Drinking to the point of developing alcohol-related liver damage is maladaptive and the kind of drinking pattern to produce such changes has to be habitually to excess. Therefore . . . my answer is “**yes.**”

The (Individual) has never been in a formal alcohol treatment program. Although he went to AA for a while after his two DWI’s in 1993, he told me “it’s done nothing for me.” So based on the above, it is my opinion that there is **not** adequate evidence of rehabilitation.

- The (Individual) drank up until two months prior to me examining him on 07/02/97. Because he now meets the *DSM-IV* criteria for Substance Dependence, rather than Substance Abuse, the only drinking pattern that is acceptable for him to be in a state of reformation, is complete abstinence from alcohol, which he does not demonstrate. Therefore, to answer your specific question, the answer is “**no.**”
- **In order to show adequate evidence of rehabilitation**, my recommendation would be that the subject does one of the following two things:

Satisfactorily complete an outpatient alcohol treatment program with a minimum of 100 hours of treatment, extending over a minimum of 6 months.

or

Produce documented evidence of attendance at Alcoholics Anonymous (AA) for a minimum of 100 hours with a minimum contact of at least once a week and extending over a year. In addition, the subject would need to get a sponsor by the 6th month that he is in AA.

In order to show adequate evidence of reformation the subject needs to completely abstain from alcohol and all non-prescribed controlled substances for a minimum of **one year** if he participates in one of the two recommendations for rehabilitation above. If the subject does not enter into a rehabilitation program as outlined above (i.e., outpatient, professionally led program or AA), then in order to show adequate evidence of reformation he needs to be completely abstinent

⁴ *The Diagnostic and Statistical Manual of the American Psychiatric Association, IVth Edition TR.*

from alcohol and all non-prescribed controlled substances for a minimum of **two years**.

1997 Report at 32-36

In response to the fourth question – *Does the subject have an illness or mental condition which causes, or may cause, a significant defect in judgment or reliability?* – the psychiatrist answered in some detail. In sum: Because of the Individual's alcohol-related liver functions and the two DWI's, the doctor answers "yes," the Individual's alcohol consumption has caused a significant defect in judgment or reliability. Whether such a defect will recur, the doctor's answer is that it depends on whether the Individual takes the steps prescribed by the psychiatrist (above) and continues to refrain from consuming alcohol. Because the Individual had only refrained from alcohol for two months at the time of the report, the doctor's answer is that "it is more likely than not (the Individual) will resume drinking with a year. After this would occur, it would just be a matter of time before the drinking again became problematic in terms of causing a significant defect in his judgment and reliability." *1997 Report at 32-36.*

Following the psychiatrist's report, a Notification Letter similar to that involved in this proceeding was issued to the Individual. Also as is the case here, the Individual requested a hearing and that was held on March 24, 1998. Before a Hearing Officer opinion was issued, however, the Individual was allowed to resign from his job "in lieu of termination for showing up at (work) on 03/21/98 with a (blood alcohol content) of .116/.117." *February 1, 2005 Psychiatrists Report (the 2005 Report) at 2.*

The matters leading to this proceeding commence with the application by the Individual's present employer for a security clearance for him. Part of that process involved a Personal Security Interview conducted on October 25, 2004 (the PSI) during which the individual admitted that he was still drinking alcohol. The PSI led to a request for another psychiatric evaluation, like that which produced the 1997 Report, for which DOE posed essentially the same four questions for the DOE-sponsored psychiatrist. The following are the questions and the doctor's answers:

1. Has the (Individual) been or is the (Individual) a user of alcohol habitually to excess or is he alcohol dependent or suffering from alcohol abuse?

Yes. The (Individual) is alcohol dependent.

2. If so, is there adequate evidence of rehabilitation or reformation?

No. The (Individual) is currently drinking.

3. **If not rehabilitated or reformed, what length of time and type of treatment would be necessary for adequate evidence of rehabilitation or reformation?**⁵

As adequate evidence of rehabilitation the (Individual) can do one of the following:

- (1) Produce documented evidence of attendance at Alcoholics Anonymous (AA) with a sponsor and working on the 12 steps at least once a week for a minimum of 200 hours over at least a two-year's time and be abstinent from alcohol and all non-prescribed controlled substances for a minimum of **two years**.
- (2) Satisfactorily complete a professionally run, alcohol treatment program, either inpatient or outpatient, including aftercare, for a minimum of six months and be abstinent from alcohol and all non-prescribed controlled substances for a minimum of **three years**.

Any future use of alcohol or non-prescribed controlled substances will be evidence that the subject is no longer showing adequate evidence of rehabilitation.

As adequate evidence of reformation there are two options:

- (1) If the (Individual) goes through one of the two rehabilitation programs above, then a minimum of **two or three years** of abstinence from alcohol and all non-prescribed controlled substances is necessary to show adequate evidence of reformation.
- (2) If the (Individual) does not go through one of the two rehabilitation programs above, then a minimum of **five years** of abstinence from alcohol and all non-prescribed controlled substances is necessary to show adequate evidence of reformation.

Any future use of alcohol or non-prescribed controlled substances will be evidence that the subject is no longer showing adequate evidence of reformation.

4. **Does the (Individual) have an illness or mental condition which causes, or may cause, a significant defect in judgment or reliability?**

The (Individual) has an illness, Substance Dependence, Alcohol. As I stated in my 1997 report, this (illness) causes or may cause, a significant defect in his judgment or reliability, at least until such time as he is showing adequate

⁵ At this point the psychiatrist enters the following qualification: "Note that in the letter to me of 06/03/97 [which led to the *1997 Report*], questions (2 and 3) say, "rehabilitation *and* reformation" rather than "rehabilitation *or* reformation." That was a template error since 10 CFR 710.8 and the Adjudicative Guidelines uses "or" rather than "and." So when I answered the questions in 1997, I answered in such (a) way that (the Individual) would need both rehabilitation and reformation. However, he only needs one or the other. Therefore, using the correct "or" rather than "and," my recommendations are as follows. These recommendations are somewhat different than my recommendations in 1997." *The 2005 Report at 2*.

evidence of rehabilitation or reformation. He is not showing adequate evidence of rehabilitation or reformation. Therefore, my answer is still “YES.”

2005 Report at 2-3

IV. THE HEARING

Attending the Hearing was the Individual, the DOE-sponsored psychiatrist and DOE Counsel. The individual called three witnesses -- a long-time acquaintance and co-worker, his sister, and a personal friend. On behalf of the Individual, DOE Counsel qualified and interviewed each witness and the Individual supplemented that procedure with his own questions, where desired.

In brief, the collective testimony of the witnesses was intended to cover the Individual's full waking life, seven days a week, while working, while at home, and during weekends. The testimony of the witnesses was that they had not seen the Individual drink alcohol for at least the past year and a half. In my view that testimony was very convincing.

The Individual testified that he had not drunk alcohol since October, 2004, and that he had stopped drinking permanently. The testimony also confirmed the substance of the record, namely, that the Individual had started drinking at 16 years of age and – with some periods of abstinence and treatment – had continued to do so despite arrest, life-threatening accident, loss of employment, as well as the urging of doctors, counselors, family and the DOE-sponsored psychiatrist.

The testimony of the DOE-sponsored psychiatrist followed closely the written recommendations in the 1997 Report and the 2005 Report set forth above. The doctor testified that, in order to reduce the likelihood of relapse to acceptable levels – for national security purposes -- the Individual must have abstained from alcohol for more than eighteen months and have undergone treatment. Without treatment, the psychiatrist stated that a considerably longer period of abstinence would be necessary before the psychiatrist could find that the likelihood of relapse was sufficiently low to allow the doctor to find reformation or rehabilitation.

IV. STANDARD OF REVIEW

A DOE administrative review proceeding under 10 C.F.R. Part 710 is authorized when the existence of derogatory information leaves unresolved questions about an individual's eligibility for access authorization. A hearing is “for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization.” 10 C.F.R. § 710.21(b) (6). Once DOE has presented derogatory information affecting an individual's eligibility for access authorization, the individual must come forward with evidence to convince DOE that restoring his or her access authorization “would not endanger the common defense and security and would be clearly consistent with the national interest.” *See, e.g., Personnel Security Hearing* (Case No. VSO-0013), 25 DOE ¶ 82,752 at 85,511 (1995), and cases cited therein. Any doubt regarding an individual's

eligibility for access authorization shall be resolved in favor of the national security. 10 C.F.R. § 710.7(a).

Applicable DOE regulations state: "The decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all the relevant information, favorable or unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). In resolving questions about the individual's eligibility for access authorization, I must consider the relevant factors and circumstances connected with the individual's conduct, set out in Section 710.7(c): the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; how recently and often the conduct occurred; the age and maturity of the individual at the time of the conduct; whether participation was voluntary; rehabilitation, reformation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuation or recurrence; and other relevant and material factors.

For the reasons discussed below, it is my opinion that the individual has not resolved the concerns in the Notification Letter, and should not be granted access authorization at this time.

V. OPINION

This is a difficult decision. If I give full credit to the witnesses' and Individual's testimony that he has not drunk any alcohol for nearly one and one-half years, since October 2004, this is very, very positive. At the same time, the record and his own testimony indicates that the Individual has stopped drinking before. So, balancing the interests of national security against the possibility that the Individual has not fully reformed his behavior – namely, could again relapse -- I cannot conclude that a security clearance should be granted. The Individual has a long history of alcohol consumption, abstention and relapse, all in full view of the continuing threat to his health from alcohol, the alcohol-related accident and hospitalization, job loss, and the opinions of the DOE-sponsored psychiatrist. With respect to the latter, I must take into account that the first of the DOE-sponsored psychiatrist's opinions and recommendations as to reformation and rehabilitation was provided to the Individual nearly nine years ago, but apparently ignored. All of this together convinces me that at a longer period of abstinence and perhaps some treatment would be necessary before I could conclude that the security risks are mitigated and the granting of a security clearance to the Individual was appropriate under the applicable standards and regulations.

VI. CONCLUSION

The Individual has not resolved the Criteria H and J concerns set forth in the Notification Letter. Therefore, I cannot conclude that restoring the Individual's access authorization "would not endanger the common defense and security and would be clearly consistent

with the national interest.”10 C.F.R. § 710.7(a). Accordingly, I conclude that a personnel security access authorization should not be granted at this time.

The parties may seek review of this Decision by an Appeal Panel under the regulation set forth at 10 C.F.R. § 710.28.

Richard T. Tedrow
Hearing Officer
Office of Hearings and Appeals

Date: May 10, 2006